No. 14884

IN THE

United States Court of Appeals For the Ninth Circuit

COMMODITY CREDIT CORPORATION, *Appellant*

v.

ROSENBERG BROS, & CO., INC., a Corporation, *Appellee*

and

ROSENBERG BROS. & CO., INC., A Corporation, *Appellant*

v.

COMMODITY CREDIT CORPORATION, *Appellee*

On Appeal from the United States District Court for the Northern District of California, Southern Division

REPLY BRIEF FOR THE UNITED STATES

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INTRODUCTORY STATEMENT

The appellee has submitted a brief arguing:

1. That the modification of the dried fruit program was a commercial, proprietary act as to which the Government has no sovereign immunity.

2. That the change in program breached the Government's implied promise to refrain from any act

which would increase Rosenberg's cost of performance.

3. That Rosenberg did not waive the alleged breach.

4. That the trial court erred in its computation of damage.

The Government's reply brief will discuss each of these points in the same order.

ARGUMENT

I.

THE ISSUE OF SOVEREIGNTY

Although appellee argues this question with considerable vigor, we believe that an elaborate discussion of appellee's contentions will serve no useful purpose. An examination of the statute under which CCC operates,[1] and of the docket in question (Pl. Ex. 5), should dispel any doubt concerning the nature of the dried fruit price support program. CCC was patently engaged in a program designed to shore up a segment of the economy which was likely to be in deep distress.

Appellee, to dramatize its contention, declares that if all Governmental acts are sovereign, the Government would "never be liable for any of its acts"

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[1] Appellee complains that appellant refers to a budget not offered in evidence. The budget referred to is the Budget of the United States Government for 1948, and the material quoted appears at p. 1193, et seq. The Budget is an official document expressly adopted by the Appropriation Act, Public Law 266, 80th Congress, 1st Sess., approved June 30, 1947; and is most assuredly a document of which this Court can take judicial notice. *United States* v. *Brewer-Elliott Oil & Gas Co.*, 249 F. 609, 619, aff'd. 260 U.S. 77; *Atlantic Transport Co.* v. *Rosenberg Bros. & Co.*, 34 F. 2d 843, (C.A. 9).

(Appellee's Brief p. 37). This is a correct statement of the law. The Government cannot be sued unless it has waived its sovereign immunity. Congress has waived the Government's immunity from suit in many—but not all—respects; it now permits suits against the Government for breach of contract and for certain torts of its employees, and suits against certain Government corporations by "sue and be sued" provisions. In the instant case, the waiver of immunity is claimed by virtue of 15 U.S.C. 714(b) which authorizes CCC to sue or be sued.

The real questions posed are:

1. Whether the "sue and be sued" clause is a waiver of the Government's non-liability for damages caused by its sovereign acts.

2. Whether CCC has contracted to pay Rosenberg for damages resulting from CCC's exercise of sovereign powers. (This issue is discussed under the Implied Contract portion of this brief, pp. 6 to 14).

The courts have provided an unequivocal reply to the first question. The "sue and be sued" clauses waive the sovereign immunity against suit, *R.F.C.* v. *Menihan Corporation,* 312 U.S. 81; *United States* v. *Edgerton,* 178 F. 2d 763 (C.A. 2).[2] However, waiver of sovereign immunity merely permits the bringing of an action, i.e., vests jurisdiction in courts, and does not carry with it waiver of substantive rights and defenses available to the Government, *Summerlin* v. *United States,* 310 U.S. 414; *Korman* v. *United States,* 113 F.

[2] Under some circumstances, the power to sue Government agencies will be implied, *Keifer and Keifer* v. *R.F.C.,* 306 U.S. 381; *Federal Land Bank* v. *Priddy,* 295 U.S. 229.

2d 743 (D.C.A.); *Choy* v. *Farragut Gardens,* 131 F. Supp. 609, 613 (SD NY); *Lynn* v. *United States,* 110 F. 2d 586 (C.A. 5); *Pacific National Fire Insurance Co.* v. *TVA,* 89 F. Supp. 978 (W.D. Va.). As stated in *Atchley* v. *TVA,* 69 F. Supp. 952 (N.D. Ala.), which involved a suit to recover damages to crops due to flooding allegedly caused by TVA (p. 954):

> The sue-and-be-sued clause in the TVA Act does nothing but remove the procedural bar to sue against an agency of the federal government. It does not engender liability in a case where liability would not otherwise exist."

Also see *Chapman* v. *Sheridan-Wyoming Co.,* 338 U.S. 621.

One of the defenses available to the appellant is the fundamental precept that the sovereign is not liable for damages resulting from the exercise of its sovereign powers.[3] (See our opening brief at pp. 25-31.) This

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[3] Appellee cites *Horowitz* v. *United States,* 267 U.S. 458, and *Maxwell* v. *United States,* 3 F. 2d 906 (C.A. 4) aff'd. 271 U.S. 647, for the proposition that the United States is liable for its "actions as a contractor, performed in its proprietary, as distinguished from its sovereign capacity." (Appellee's Brief, p. 34). Appellee remains confused as to the basis of liability. The Government is not liable for its contractual acts merely because they are of a *proprietary* nature. The Government's liability is founded upon its consent to be sued for violation of contracts into which it has entered, and not because of any hypothetical distinction between sovereign and proprietary acts. Furthermore, the two cases are not helpful to appellee's cause. The *Horowitz* case is the leading authority on the subject of Government immunity from damages resulting from the exercise of sovereign power. In the case of *Maxwell* v. *United States, supra,* the Government filed an action to recover extra expense resulting from the construction of a post office, following termination of the contract for failure to complete. The defendants alleged that the Government by reason of priority

defense disposes of the present action unless the Court concludes that CCC *contracted* to compensate Rosenberg for losses sustained as a result of program modification.

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orders which kept the contractor from securing brick, had caused the delays which resulted in the termination of the contract. The Court held that this was not a valid defense, stating (p. 911):

> The government in the exercise of its war powers, did what it could to put to the best possible use all available coal as well as the means for moving it. To this end it found it necessary to interfere with the ordinary freedom of trade and transportation. It issued priority orders and thereby kept the contractor's brickmaker from getting sufficient coal to burn the bricks he otherwise would have made. In consequence, the contractor was put not only to annoying inconvenience but to serious loss as well. There were hundreds of thousands of others to whom the same or similar orders brought like hardships. It is certain that they have no legal claim upon the government. In this respect, he is no better off merely because his contract was with it and theirs with private citizens.

Appelle also argues (Brief, p. 34) that the United States when acting in a commercial capacity is subject to the same rules as private persons, citing *United States* v. *Skinner & Eddy Corp.*, 28 F. 2d 373, mod. 35 F. 2d 889, and *R.F.C.* v. *J. G. Menihan Corp.*, 312 U.S. 81. This statement is correct where the commercial activity takes the form of *contract* as in the *Skinner & Eddy* case.

The *Menihan* case involved a suit by R.F.C. based on alleged infringement of a trade mark. There, jurisdiction rested on a "sue or be sued" clause, and the court held that the Government was liable for costs when it lost the litigation, the same as a private individual would have been.

Appellee also argues (Brief, p. 34) that different legal principles apply when the contracting agency performs the act complained of, citing *Beuttas* v. *United States*, 77 F. Supp. 933 (C. Cls.). The *Beuttas* language quoted by appellee is dictum. The case stands for two propositions: (1) that when the terms of a contract exclude an executive order, the contracting officer breaches the contract by requiring compliance therewith, and (2) that doubts concerning

II.

THE ISSUE OF IMPLIED CONTRACT

As indicated in our opening brief (p. 32), the opinion of the District Court does not clearly define the basis of liability. Nor does appellee's brief clarify the matter. It is unclear to us whether the District Court imposed liability because the Government, by changing the price support program, breached an implied agreement to refrain from any act which would increase Rosenberg's cost of performance, or because the Government breached express representations allegedly made by CCC that the program would not be altered. The District Court's opinion (R. 56) states that if the press release is part of the contract, CCC's change of program would constitute a breach of the *express* contract; but that if the formal contract represented the complete agreement of the parties, then the change in program would constitute a violation of the *implied* promise not to increase the cost of performance. Having stated its premise, the District Court proceeded to find that liability was predicated upon breach of the *implied* agreement, although it

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the authority of Government officials, and doubts concerning the intention of the parties in executing the contract, cannot be resolved on demurrer.

We see no logic whatsoever in appellee's suggestion that the Government is liable for damages due to sovereign acts initiated by the same agency which makes the contract. The liability of the Government for breach of contract, and its non-liability for damages resulting from performance of a sovereign act, are based upon principles of law unrelated to, and not depending upon, matters of identity. See *Horowitz* v. *United States, supra.* Also see: *Maxwell* v. *United States*, supra.

plainly based its judgment upon the breach of alleged promises contained *in the press release* (R. 57-59).

Appellant believes that liability does not exist on either count.

From the Terms of the Formal Contracts It Cannot Reasonably Be Concluded That CCC Impliedly Agreed Not to Change the Announced Program

The formal contracts provided simply for the purchase of a specified quantity of raisins at a stated price to be delivered in a specified period.[4] The contracts did not refer directly or indirectly to the announced program.

We believe that liability cannot rest solely upon the proposition that a contract to buy a commodity from "A" obliges the buyer to refrain from making other purchases, if such other purchases have the effect of increasing the market price (see our opening brief at pp. 33-39). Thus, if CCC had simply advertised for bids for a given quantity of raisins, and had contracted with Rosenberg for that quantity, and if CCC

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[4] Appellee characterizes the contract as a "piecemeal" contract (Brief, p. 55), which included the announcement of CCC's contemplated program. This characterization is unjustified. The contract is in evidence. In consists of the usual invitation to bid, offer and acceptance. The contract is complete in every sense, and appellee only terms it as "piecemeal" because the contract as written does not contain any clause upon which appellee can rest its case.

Appellee's quotation from *Bailey* v. *Railroad Co.*, 84 U.S. 96, states that "writings executed between the same parties * * * may be read together * * *". The announcement was patently not a contractual document "executed between the same parties." It was a public announcement of an official price support program, without any contractual element.

had later contracted to buy more raisins from other packers, with a consequent increase in market price, CCC would not have been liable to Rosenberg, and we believe that appellee does not so contend. For appellee states (Brief, p. 52) that "CCC is liable for damage to Rosenberg caused by its action inconsistent with that announcement" (of September 5).

We submit, then, that liability, if it exists at all, exists because of a representation made to Rosenberg that CCC would not buy more raisins than that indicated in the announcement, such a representation carrying with it an implied agreement to pay whatever damages were caused by breach of such a representation.[5]

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[5] In finding that CCC breached an implied agreement not to increase Rosenberg's cost of performance, the District Court relied, as does appellee, upon the case of *Sunswick* v. *United States,* 75 F. Supp. 221 (C. Cls.), cert. denied 334 U.S. 827. We have already pointed out the basic distinction between that case and the instant case (see our opening Brief at p. 43). It should also be noted that later cases and opinions suggest that the authority of the *Sunswick* case should be confined to the exact set of facts there present. See 34 Texas Law Rev. 315, 317, *Kirchhof* v. *United States,* 102 F. Supp. 770 (C. Cls.); *Ross Engineering Co.* v. *United States,* 127 F. Supp. 580 (C. Cls.); *J. B. McCrary Co.* v. *United States,* 84 F. Supp. 368 (C. Cls.). Also see *Shedd-Bartush Foods of Ill.* v. *CCC,* 135 F. Supp. 78 (Ill.).

A more parallel case is that of *Standard Accident Ins. Co.* v. *United States,* 59 F. Supp. 407 (C. Cls.), cited in our opening brief (p. 28) in connection with the issue of sovereign power. There, the Government, after executing a lump sum contract executed cost-plus-fixed-fee contracts in the same area, the effect of which was to increase the first contractor's cost of performance. In denying recovery, the Court pointed out that the contractor must have known of the National Defense and Appropriation Acts, and of the sovereign right of the Government to carry out the provisions

This brings us to a consideration of the nature of the press release, or announcement, as appellee prefers to term it.

The Press Release Was Not a Warranty That CCC Would Not Modify Its Announced Program

Neither the press release nor announcement of the tonnages to be purchased was referred to in the invitation to bid, the contract or specifications. Therefore, the appellee's claim does not fall within that category of cases where material representations contained in the contract are binding, despite other qualifying clauses. See *Hollerbach* v. *United States,* 233 U.S. 165, and *United States* v. *Stage Company,* 199 U.S. 414.

And although we might be tempted to classify the announcement as a preliminary negotiation, so that we could argue that it became merged in the written contract (*Simpson* v. *United States,* 172 U.S. 372), we cannot do so, since the announcement was not the result of negotiation, but was a unilateral declaration of a government price support policy.

Appellee, however, argues (Brief, p. 45) that the press release contained language which was so unequivocal as to constitute a flat representation which induced Rosenberg to execute its contracts. With the customary zeal of an advocate, appellee cites only that portion of the release which it believes will buttress

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of those acts, "by contract, or otherwise" even though the Government's acts caused damage to Government contractors. So here, in offering to sell raisins to CCC, Rosenberg did so, knowing that the purpose of the program was price support, and that CCC would be free to accomplish that sovereign purpose "by contract, or otherwise," without incurring the liability herein sought to be imposed.

its argument. The Court, undoubtedly, will study the release, and we see no reason to dissect its language. But we do desire to point out that:

(1) There was no statement that CCC would not, if necessity required, modify its program.

(2) There were definite statements indicating the tentative nature of the program.

The release stated that CCC would purchase *up to* 133,000 tons of dried fruit, "*if* the purchase of this total quantity was necessary to provide outlets for the relatively large 1947 production." The release went on to say that an announcement would soon be made inviting packers to bid on a *portion* of the quantity (Pl. Ex. 4). Its tentative nature is further manifested by the fact that the program as ultimately conceived called for the purchase of 285,000 tons of fruit, rather than the 133,000 tons mentioned in the initial press release.

This Court must be aware that programs of this description, based on incomplete data, and subject to unknown contingencies, are always being modified—to meet changing circumstances—including the change in viewpoint of policy making officials; and that such changes are such common practice that Rosenberg must be presumed to have executed its contracts with full knowledge of the possibility of change.

CCC Officials Did Not Promise That the Announced Program Would Not Be Modified

Appellee is apparently aware of the inadequacy of the press release as a contractual commitment, for it couples with this contention a claim of "repeated in-

sistence by CCC officials that the program 'as announced' would not be changed'' (Appellee's Brief, p. 43). In short, appellee contends that CCC converted a statement of policy into a contractual representation by expressly promising that the program would not be changed. This, if true, would present a stronger case for appellee. But appellee's assertion is not supported by any reference to the record, and distorts the facts.[6] Later in its brief, appellee again refers to this matter (Brief, p. 46), and cites R. 173-177. This record reference does not support appellee's statement. *There was no representation by any Government official that the program would not be changed, and we challenge appellee to furnish proof of its allegation.* In our opening brief (p. 51), we pointed out that appellee's case rests on a telegram sent by Smith, a Department of Agriculture official, to Grady. Grady had suggested that the program be modified, and that prices be fixed under certain provisions of the Webb-Pomerene Act. Smith replied that Grady's proposal ran counter to the announced program, and that he solicited and expected the packers' co-operation in making the program a success (Pl. Ex. 8). This telegram was certainly not a warranty against change, and no reasonable man could so interpret it.

It should also be noted that Smith was not the contracting officer, and had no authority insofar as appears from the record to bind the Government to a

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[6] The appellee's brief contains a number of misstatements of fact; but in order to keep the reply brief within the limits allowed, we have confined our discussion to the more critical of the misstatements.

fixed program. Nor could he contract away the Government's right to change Governmental policy. *Gerhardt F. Meyne Co.* v. *United States,* 76 F. Supp. 811 (C. Cls.). Appellee's repeated allegations that CCC had represented that the program would not be changed cannot alter the facts, nor can wishful thinking convert a rejection of the Webb-Pomerene proposal into a promise not to buy more raisins.

A Promise to Keep a Price Support Program Rigid Should Not Be Implied When the Circumstances Explicitly Reject the Existence of Such a Promise

Before closing our brief discussion of this issue, appellant believes it worthwhile to quote from a recent law review comment on the instant case. (See 56 Col. L. R. 282, 285.):[7]

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[7] Appellee continuously refers to the fact that the Secretary of Agriculture refused to cancel the contracts and to the fact that Rosenberg offered to cancel all its grower contracts. These matters do not bear upon the legal issues. The present action is not based upon any legal right flowing from this refusal to cancel or renegotiate, and appellee's repeated references may be intended to prompt an emotional reaction, rather than to direct the Court's attention to the genuine issues. Appellant has, therefore, not dwelt on these matters. However, no matter how irrelevant, the facts should be objectively and correctly stated.

It is true that the Secretary refused to cancel the contracts. He did this on the advice of counsel that he could not legally do so (R. 403-404). It is also true that Rosenberg offered to cancel its grower contracts. But at the time of its offer, Rosenberg had fixed price contracts for a total of only 156 tons of raisins (Pl. Ex. 46).

Appellee also describes as "shocking" CCC's acceptance of the second of Rosenberg's offers the same day that it announced the additional purchases. While it is true that CCC so accepted appellee's second offer, appellee neglects to point out the highly pertinent surrounding circumstances. The change in program was a matter of grave concern and of considerable dispute. Senator

Although the scope of immunity for subsequent interference may be limited by the element of bad faith, the instant court seems to have erred in finding that a change in program from that projected in the press announcement was an unconscionable position. In inferring that the press release and its encompassed program was the basis for the understanding between the parties the court overlooks the statutory mandate of the Commodity Credit Corporation Charter Act [62 Stat. 1070 (1948), as amended 15 U.S.C. §§ 714-714(o) (1952)] and the purposes served by the dissemina-

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Downey had been diligent and persistent in his efforts to persuade the Government to modify its program. The growers themselves had been in a state of protracted turbulence and were highly vocal. About October 9, buying being at a standstill, CCC decided to enter the market. This decision was not secret nor arrived at out of any malice to the packers (R. 146). It was so generally known, that the Fresno papers carried an account of the pending decision in its papers on October 10 and 12 (Def. Exs. P, Q, id.). And as Senator Downey, appellee's witness testified, Rosenberg must have known about this decision (R. 140). Rosenberg then had a few days to withdraw its offer, but did not do so.

Appellee, recognizing that the newspaper accounts undermine its pretension that it was caught unaware by the October 14 announcement, seems to minimize them by characterizing them as "reports of rumors of unsuccessful efforts to effect a change." But the facts do not support this characterization. This Court will note that the newspaper accounts are based on Senator Downey's public statements. On October 10 he urged the growers not to sell because he was confident that the Government "will develop a purchase program which will save the growers from suffering an unwarranted loss." On October 12, Senator Downey stated that the Secretary of Agriculture would announce not later than Tuesday (October 14) "additional programs for the support of dried fruit sales, particularly raisins and prunes." He then urged the growers not to sell until after the announcement was made. The announcement was in fact made on Tuesday, October 14, and Rosenberg is hardly in a position to cry "Surprise."

tion of information by a federal agency. It is highly unlikely that the CCC intended to set forth limitations on its ability to cope with unexpected market developments in either a press announcement [Cf. RFC v. MacArthur Mining Co., 184 F. 2d 913 (8th Cir. 1950), cert. *denied,* 340 U.S. 943 (1951)] or negotiations with a private contractor. Since the statutory objectives may require immediate response to changed conditions irrespective of existing commitments, it appears unwarranted to impose, from a present statement of intended future conduct, an obligation to refrain from change or, secondarily, to make compensation for loss caused by such change. Although it may be desirable to renegotiate contracts in these circumstances in order to augment future cooperation with announced programs, that decision is best left for the agency to determine in the light of its existing commitments and future policy. [Cf. 37 Ops. Att'y Gen. 253 (1933); 28 Ops. Att'y Gen. 121 (1909)].

III.

THE ISSUE OF WAIVER

The Performance of An Executory Contract After Breach Waives the Breach, When the Peformance, Not the Breach, Caused the Loss Complained of

In response to appellant's first contention that appellee waived the breach since the contract was entirely executory, and that appellee's performance, not the breach, caused the damage complained of, appellee contends (Brief, p. 59) that appellant "misrepresented" the facts by claiming that Rosenberg did not buy raisins until after the alleged breach had occurred. However, the facts, allegedly misrepresented, are in actuality fully supported by the opinion of the District

Court and by the record. (See R. 63-64, R. 294-302, 317-319, Def. Ex. V, W; see also our opening brief, pp. 61-62).

Appellee also cites legal authority for the proposition that in the event of breach, the injured party has the election either to rescind, sue at once, or to continue performance. This is true where the *breach* causes actual damage. In such instances the injured party is given the election mentioned. But here, the Government's asserted breach did not cause any damage since the contract was entirely executory. The damage did not occur until Rosenberg purchased the raisins—following the alleged breach—and hence it was appellee's action, not the breach, which caused the financial loss. Appellee could have avoided all loss by not entering the market. In these circumstances, recovery is not permitted, as the appellant's authorities establish (see our opening brief at 63-65).[8]

Rosenberg Waived the Breach by Accepting CCC's Offer to Renew the Contract at the Contract Price

The appellant further urged waiver on the ground that the contracts had been reinstated by CCC upon the express understanding that delivery would be at the contract price. Appellee argues, in reply, that the agreement related only to shipment, and not to price.

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[8] The instant case was also the subject of comment in the Texas Law Review (Vol. 34, pp. 315-317). The reviewer noted that Rosenberg "was aware of the so-called hindrance when he elected to continue performance, and knew that performance would result in increased cost. He might have been excused if he had ceased performance after the second CCC program was put into operation, but he should not be allowed to recover damages which were avoidable," citing cases.

(Brief, p. 62.) The dispositive answer is found in the correspondence involved (See our opening brief, pp. 68-72). Appellee ignores the fact that CCC's offer to accept the raisins at a late date was contingent upon delivery "at the contract prices"; that the offer further stipulated that the "prices would not be raised", and the further fact that Rosenberg was told that shipping instructions could not be issued if Rosenberg were to assert any claim for higher prices. (See our opening brief, pp. 60-70).

Appellee further argues that if "CCC intended to extract the waiver of Rosenberg's claim for damages, it should have so stated." (Brief, p. 64). By the same token, if Rosenberg was not willing to deliver at the contract price as specifically provided in the offer, why did not Rosenberg say so? The issue has to be decided by what the parties did say rather than by what they did not say.

The correspondence makes it clear that Rosenberg accepted the offer to reinstate the contracts knowing that the contracting officer intended to pay no more than the contract price. This unquestionably constituted a waiver.

IV.

THE ISSUE OF DAMAGE

Appellee Has Not Established That Rosenberg Could Have Purchased Raisins at $110 Per Ton, Absent the Alleged Breach

In answer to the Government's contention that there is insufficient evidence to establish the price at which raisins would have sold had there been no program modifications, appellee offers the testimony of Mr.

Grady who speculated that the price would have dropped to $110. Appellee then states that the Government offered "not one scintilla of evidence in the record to contradict Grady's expert opinion." (Brief, p. 68). This statement is not supported by the record. The evidence in rebuttal is noted in our opening brief, pp. 76-79, and need not be repeated here.

Appellee further states (Brief, p. 68), "The appellant's marketing expert S. R. Smith, heard Grady's testimony but did not contradict his analysis of the raisin market. Smith himself, testified that the market did reach a level of $110 in late October" (R. 50). This is a strange argument coming from appellee. If the market declined to a level of $110 to $115 in *late October,* as Smith testified, and as appellee now argues to be the fact, what happens to appellee's claim that the modification on October 14, 1947 increased the price of raisins?[9]

Appellee further argues that proof of the October price of $110 is established by the fact that Rosenberg bought "some raisins" at that price. The fact is that despite Rosenberg's heavy commercial commitments, and despite its contract to deliver 14,000 tons of raisins to CCC, Rosenberg only purchased by fixed

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[9] Appellee regards the announcement of November 26, as a further breach of contract. Strangely enough, Rosenberg offered to sell 2,000 tons of raisins on November 18, 1947, and CCC accepted the offer on November 26 (Def. Ex. AA), *the date of the policy change.* If the announcement had had the effect of raising prices, as appellee contends, why did not appellee sue for breach of this third contract? We think it reasonable to assume that Rosenberg did not claim damages because the November 26 announcement, in reality, had no effect on the market price. (See Appendix C, Appellant's Op. Br.).

price contracts the following tonnage in the periods indicated (Pl. Ex. 46):

Period Ending		*Amount*
10- 6-47		151 lbs.
10-14-47	app.	135 tons
10-20-47	app.	32 tons
10-27-47	app.	3 tons
Total	app,	171 tons

If Rosenberg was able only to buy this trifling amount (the average cost was $112), it seems evident that the prevailing price must have been much higher.

Appellee also argues that the bids submitted reflected a grower price of $110. This is not accurate. The bids were submitted in the expectation that when the open contracts were closed, they would be closed at a price which would furnish a profit or at least prevent financial loss. They did not reflect existing market prices. Rosenberg bid *below the market price* in order to get the business.[10]

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[10] Appellee claims that the Government's statement that Rosenberg's bid was made below the market price (Brief, p. 50) is not true. The truth of the statement is not only borne out by the market reports (See our opening brief, p. 80, footnote 51), but also by the testimony of Mr. Arnold who at the time of the action involved was a vice-president of Rosenberg. He testified that Rosenberg bid below the market because the company officials believed that this would be necessary in order to compete successfully against the co-operative (R. 586). Appellee's counsel have referred to Mr. Arnold as a disgruntled ex-employee, thus seeking to impugn his credibility. But the fact is that far from being a disgruntled ex-employee, Mr. Arnold has become president of Rosenberg (see Poor's Register of Directors & Executives, 1956 ed., p. 978). Appellee also takes umbrage at appellant's statement that

In contesting appellant's argument that the price would not have dropped to the $110 level because of the strong grower resistance to such offers, appellee alleges that grower resistance did not result in higher prices and appellee intimates that the District Court so found. (Brief, p. 72). As a matter of fact, the District Court stated that (R. 54):

> Because of the uncertain condition of the market and grower resistance to low prices, plaintiff was unable to acquire raisins in large quantities in the latter part of September and the early part of October.

And at R. 57 the Court said:

> Grower resistance to the buying program developed in September and continued through October.

It seems therefore, that the court was cognizant of the impact of grower resistance on the price structure, and of its effect on Rosenberg's purchases.

Appellant Has Not Established the Price Paid for the Raisins Delivered to CCC

With respect to the next issue—as to what Rosenberg actually paid for the raisins furnished the Government—appellee argues (Brief, p. 74) that the evidence shows possession by Rosenberg of sufficient raisins to fill the Government contracts on or before January 27, and states that the record (R. 625-626) shows that a Government witness "reluctantly admitted that * * *

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the action of Rosenberg, through the use of open contracts, resulted in depressing the market price, but this was the testimony of the same Mr. Arnold (see R. 587-588).

Rosenberg had already covered its CCC commitment at that price" (of $133.60). The truth of it is that the contracting officer was testifying from notes made several years prior to his testimony—notes which contained the figure $133.60, and in trying to recall what these figures referred to he stated that his memory was not clear. However, at the insistence of appellee's counsel, he speculated as to their meaning, and stated that he thought Grady had told him that Rosenberg "had either covered or would have to cover at that figure" (R. 625). In any event, the contracting officer's recollection of what Grady said is not proof of the fact. The same observation holds true with respect to appellee's contention (Brief, p. 75) that the price was verified by Grady's letter to Senator Downey that Rosenberg would lose $315,000 on the deal. This is not proof of price.

Appellee also argues that it had purchased the raisins for CCC commencing in October, and requests the Court, in determining cost, to apply the first in-first-out rule. The fact is that Rosenberg refused to make delivery until January, contending that it had no raisins to deliver to the Government; hence any formula of first in-first out is without support in the record. Although we do not regard the opinion or findings of the District Court to be invulnerable, on this one issue its conclusion is backed up by documentary proof, and should not be disturbed (see this brief, pp. 14-15).

CONCLUSION

This case is of great importance. The appellee has a large financial stake in the outcome. The appellant,

if the decision of the District Court is upheld, may be faced with tremendous liabilities, for Government economic programs are constantly being changed—cancelled—augmented—and we have no doubt that in many instances the revisions have not redounded to the financial benefit of everyone concerned.

Cutting to the heart of the principal issue in the case—that of implied contract—appellant submits that in determining the existence of an implied contract, this Court is not required to adopt irrational conclusions. Appellant further submits that it would be highly unreasonable to conclude from the mere announcement of a Government stablization program that the Government, by implication, had agreed to abandon its sovereign prerogative of changing that program if the state of the economy so required.

Since the Government may not contract away its right to exercise its sovereign powers, the Government should not be found to have agreed to respond in damages for such action in the absence of clear proof of an intent to assume such an unusual liability.

WHEREFORE, appellant submits that the judgment of the District Court should be reversed, with costs to appellant.

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